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Federal and State  
Employment Law Update



**Audio Dial-In Information:**  
U.S. & Canada: 866.740.1260  
Access Code: 7853891  
**January 19, 2012**

Melanie Lockwood Herman, *Executive Director*  
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Special Thanks...

- Mark Busto
- Sebris Busto James, Bellevue, WA
- [www.sebrisbusto.com](http://www.sebrisbusto.com)
- Resource: "Labor and Employment Law Year in Review – 2011"
  - Pages 1-20 – Federal Court Decisions
  - Pages 29-38 – NLRB Decisions/Rules

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## Federal Case Law Update



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## ADA: Effectiveness of Accommodation

*EEOC v. UPS Supply Chain Solutions, 620 F.3d 1103 (9th Cir. 2010)*

- **Issue:** Whether accommodations enabled deaf employee to participate equally in employment.
- **Held:** Defendant did not offer reasonable accommodation; was required to engage in interactive process to identify accommodations that would work.

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## 29 C.F.R. § 1630.2(o)(1)(iii).

- EEOC regulations define the term reasonable accommodation to include “[m]odifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”

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## EEOC v. UPS Supply Chain

- “[O]nce an employee requests an accommodation . . . , the employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation.” *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002). This interactive process “requires: (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee’s request; and (3) offering an accommodation that is reasonable and effective.”

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## Title VII: Sexual Harassment of Male Employees

*EEOC v. Prospect Airport Services*, 621 F.3d 991 (9th Cir. 2010)

- **Issue:** What must a plaintiff show to prove the “unwelcomeness” element of a hostile work environment harassment claim?
- **Held:** Employer potentially liable because male employee clearly communicated unwelcomeness
  - “Welcomeness” inherently subjective; cannot assume that men welcome sexual advances from women

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## “Severe or Pervasive”

- Title VII is not a “general civility code.” A violation is not established merely by evidence showing “sporadic use of abusive language, gender-related jokes, and occasional teasing.” A violation is established when the unwelcome sexual conduct is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”
- Source: *EEOC v Prospective Airport Services*

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## Title VII: Third Party Retaliation

*Thompson v. North American Stainless, LP, 131 S. Ct. 863, 178 L. Ed. 2d 694 (2011)*

- **Issue:** Whether third parties may bring Title VII retaliation claim based upon another person's protected activity?
- **Held:** Any "person aggrieved," *i.e.*, any plaintiff with an interest "arguably sought to be protected" by Title VII, may bring retaliation claim. Claim allowed.

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## Independent Contractors – Multi-Factor Test

*JustMed, Inc. v. Byce, 600 F.3d 1118 (9th Cir. 2010)*

- **Issue:** Whether worker was employee, or independent contractor and owner of software he wrote for employer
- **Held:** Worker was an **employee**, not a contractor. Why?
  - work was for indefinite duration
  - formal title indicated broad relationship with company
  - paid regular salary
  - hired to replace an employee
  - worked on ongoing project vital to the Employer's business

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## ...And a Note About Volunteers

FLSA only defines "volunteers" with respect to state or local government agencies

- Individual receive no (or nominal) compensation
- Services are not same as those for which individual is employed to perform

State law may also offer insight on the definition of "volunteer."

For example, in Washington State, volunteers:

- Give time freely and without anticipation of compensation;
- Are not paid for their services
- May not be employed by the same agency or organization to perform the same or similar services.

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**Risk Management ESSENTIALS**  
Tips, Knowledge and Tools for Nonprofit Organizations

**2013 Risk Management Workbook: A Handbook and Checklist**  
The 2013 Risk Management Workbook covers all areas of risk management, including:

- January 4: Risk Management Checklist
- February 7: Managing Your Risk - Step 1: Assess
- March 7: Crisis Response Plan and Other Key Steps to Take

The 2013 Workbook contains content from previous years' editions, including:

- January 19: Handling Your 501(c)(3) Financial Obligations
- March 15: Disaster Preparedness: Planning to Respond to a Catastrophic Event
- April 1: New Programs to Include in Your Risk Management Plan
- August 1: How to Handle Your 501(c)(3)'s Financial Obligations
- October 1: Handling Your 501(c)(3)'s Financial Obligations

Visit [www.nonprofitrisk.org](http://www.nonprofitrisk.org) for more information and to purchase the workbook.



**The Volunteer Issue**

**Employee or Volunteer: What's the Difference?**

**By MICHAEL L. LEONARD, ESQ.**  
Nonprofit organizations frequently depend on the service and commitment of volunteers as well as the labor of employees. The risks and potential liabilities of each type of worker being carefully managed in order to best place the nonprofit. Moreover, because there are two types of workers in any nonprofit: paid and volunteer staff. No matter how small the organization, it is critical that there is strict adherence to the distinction between employee and volunteer. There is often an individual working as both an employee and a volunteer. Many nonprofit organizations make it difficult to make that distinction.

of employee versus volunteer status. Whether employees may also volunteer and the consequences of categorizing volunteers.

**When Employees Also Volunteer**

Many nonprofits have employees who serve as unpaid volunteers. Each year, the federal government estimates that about 100 million Americans are paid to do their jobs and about 20 million are unpaid.

*(continued on page 2)*

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**Risk Management Tips**

- *Put it in writing* – use position descriptions or Volunteer Agreements to clarify volunteer roles
- *Document policies in separate manuals*
- *Never ignore “off the clock” service*
- *Never coerce employees to volunteer*

Source: Risk Management Essentials

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**Computer Fraud and Abuse Act**

**United States v. Nosal, 642 F.3d 781 (9th Cir. 2011); LVRC Holdings, LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009)**

- **Issue:** Whether use of company computer system against employer interests violates CFAA?
- **Held:**
  - *Nosal:* Violation; employee was aware of computer use restrictions
  - *Brekka:* No violation; employer knew employee had competing business, did not require employee to sign agreements limiting access to/use of documents

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## FLSA: Deductions from Pay

*Gordon v. City of Oakland, 627 F.3d 1092 (9th Cir. 2010)*

- **Issue:** Whether employer has right under FLSA to deduct from employee's final wages amounts owed under a pre-existing loan agreement with employee
- **Held:** City satisfied FLSA by paying Plaintiff at least minimum wage for final work period
  - Plaintiff had option to seek repayment of balance as ordinary creditor

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## Lilly Ledbetter Fair Pay Act of 2009

*Amends the Civil Rights Act of 1964*

- 180-day statute of limitations for filing charge of pay discrimination resets with each new discriminatory paycheck
- Back pay awards still limited to 2 years
- Protect yourself:
  - Develop specific criteria for compensation decisions.
  - Audit current pay documentation practices.

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## Dodd-Frank Act

*Amended Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq.*

- Any employer using credit score to make adverse decision must provide within 30 days:
  - notice that a credit score was used;
  - the actual credit score; and
  - the identity of the agency that provided the score

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## Smart Phone Use

29 U.S.C. § 207 ("Maximum hours" for overtime purposes)

- **Issue:** Non-exempt employees use their smart phones to perform work-related tasks when they are off the clock.
- Currently no lawsuits/legislative action.
- Employers potentially liable for overtime compensation.
- Develop policies and procedures banning overtime use of smart phones to do work.

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## What is the National Labor Relations Act?

- The Act guarantees employees the right to organize and to bargain collectively with their employers or to refrain from such activities. The Act, which generally applies to all employers involved in interstate commerce, implements the national labor policy of assuring free choice and encouraging collective bargaining as a means of maintaining industrial peace.
- Source: [www.nlr.gov](http://www.nlr.gov)

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## Social Media And the NLRB

- **Social Media Policies:** Should not chill exercise of Section 7 rights, e.g., restrict discussion of wages or corrective actions
- **Discipline/Discharge:** Does the post concern protected activity? See complaint in *Hispanics United of Buffalo, Inc.*, (May 9, 2011) (discharge of 5 employees for complaints re working conditions)
- **Failure to Bargain:** NLRB complaints have alleged failure to bargain newly adopted social media policies

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## “Protected Concerted Activity”

**Potentially Unlawful under the NLRA:**

- Discharging five employees for responding to a co-worker’s Facebook posting
- Policy prohibiting staff from posting pictures of themselves with organization logos is overbroad because it can be interpreted to prohibit employees from posting pictures of themselves engaged in concerted protected activity, such as picketing or other protests against their employer.

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## Potentially Unlawful under the NLRA

- Policy prohibiting employees from making disparaging comments when discussing the organization or its supervisors because the policy did not make clear that it did not prohibit protected concerted activity....

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## Lawful under the NLRA

- Discharging an employee at a residential facility serving the homeless after the employee **posted demeaning comments about the agency's clients**.
- Why? No evidence of protected concerted activity... **comments did not mention any terms or conditions of employment**, posting was not discussed with any co-workers, and comments were not for the purpose of inducing group activity or an outgrowth of collective concerns of the employee or her co-workers.

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## Lawful under the NLRA

- Terminating a bartender who complained on Facebook to his stepsister, a non employee, that: he had not received a raise in five years, was doing "waitress" work without tips, the bar's customers were rednecks, and sharing his "hope" that customers would "choke on glass as they drove home drunk."
- Firing an employee who posted profane comments on Facebook critical of management. Posts were an expression of individual gripes as opposed to protected concerted activity. Although two co-workers responded to the posting, their messages reflected that the posting was individual and not group activity.

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## "Protected Concerted Activity" and the NLRA

- Employees "gripping, uniting, or discussing terms and conditions of employment = **protected activity**
- Firing employees engaged in protected activity is a violation of the NLRA
- *NLRB v. White Oak Manor* – employee took photos of other employees wearing hats and violating company dress code. 4<sup>th</sup> Circuit ruled that termination violated employee's rights.

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## Social Media Account Ownership

(*Eagle v. Morgan*, C.A. 11-4303 (E.D. Pa. 2011)).

- Linda Eagle sued Edcomm, a company she co-founded, for violation of the CFAA, the Lanham Act, and invasion of privacy by misappropriation of identity. Suit was brought after Dr. Eagle discovered that she had been locked out of her LinkedIn account after her termination eight months after the sale of the company.
- Edcomm countered that Eagle “unlawfully misappropriated a trade secret” (her LinkedIn connections and client identifies) as well as property (a telephone number and laptop)
- On 12/22/11 a District Court ruled that a LinkedIn connection is not a trade secret, but the case is still pending
- Read more: [http://blog.ericgoldman.org/archives/2011/12/another\\_set\\_of\\_1.htm](http://blog.ericgoldman.org/archives/2011/12/another_set_of_1.htm)

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## Independent Contractor... or Employee?

- In a December 27, 2011 decision, the NLRB reversed a regional director’s decision and found that musicians for orchestras in PA, MA and TX as employees, not ICs. Case sent back to region for further action.
- Factors weighing in favor of employee status:
  - Once selected to work, control over work time ends; musicians subject to set work hours, payment schedules, dress codes, standards of behavior.
  - No “entrepreneurial opportunity or risk” because fees are set.

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## ADAAA: Final EEOC Regulations

*Final EEOC Regulations implementing ADAAA passed in March*

- Defines “disability:”
  - physical or mental impairment that substantially limits one or more major life activities;
  - a record (or past history) of such an impairment; or
  - being regarded as having a disability.

<http://federalregister.gov/a/2011-6056>

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## ADAAA: Final EEOC Regulations (cont.)

- Adopts rules of construction to help determine if individual is “substantially limited in performing a major life activity.”
- Lists impairments generally considered as disabilities as defined by the ADA.
- Prohibits consideration of mitigating measures when determining whether someone has a “disability.”

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## ADAAA: Final EEOC Regulations (cont.)

- Retains “condition, manner, or duration”
- Coverage focuses on how a person has been treated.
  - Not on what employer believed about nature of person’s impairment.
- “Transitory and minor” disability defense available to employer.
  - Short-term impairment may be disability if substantially limiting.

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## FLSA: Work Breaks for Nursing Mothers

29 U.S.C. §207(r)

- Provides additional protections for non-exempt employees who are nursing mothers
- Reasonable break time to express breast milk for up to one year
- Place shielded from view and free from intrusion from co-workers and the public
- Employer with < 50 employees exempt *but only if* compliance would impose undue hardship

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## FMLA: "Son or Daughter" Expanded

- Employee may take FMLA leave to care for child for whom Employee acts as a parent ("*in loco parentis*").
- New DOL guidance:
  - Includes those with day-to-day responsibilities to care for or financially support child;
  - Biological or legal relationship not necessary;
  - Covers unmarried partners, grandparents, lesbian, gay, bisexual, and transsexual families.

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[www.dol.gov/whd/state/fmla/index.htm](http://www.dol.gov/whd/state/fmla/index.htm)

Wage and Hour Division (WHD)

**Federal vs. State Family and Medical Leave Laws**

The Federal vs. State Family and Medical Leave laws comparison charts are being updated to reflect the new federal [FMLA Final Rule](#), effective January 16, 2009. To review information about individual state family and medical leave laws, please check the following state Web pages with similar statutes: [California](#), [Connecticut](#), [Hawaii](#), [Maine](#), [Minnesota](#), [New Jersey](#), [Oregon](#), [Rhode Island](#), [Vermont](#), [Washington](#), and [Wisconsin](#) and the [District of Columbia](#).

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## GINA: Final EEOC Regulations

**Final EEOC Regulations implementing GINA effective January 11, 2011**

- Prohibits employers with 15 or more employees from:
  - discharging, refusing to hire, or discriminating on basis of genetic information; and
  - intentionally acquiring genetic information about applicants/employees.

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## GINA: Final EEOC Regulations

- Protects:
  - Current/former employees, job applicants
  - Employees' "family members"
- Example - Fink complaint:
  - Filed EEOC complaint claiming employer terminated her for having breast cancer gene;
  - Disclosed genetic status to employer;
  - Had preventative surgery, returned to negative performance reviews, fewer responsibilities;
  - Demoted & fired – outcome pending.

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## Fair Credit Reporting Act

- **New guidance from the FTC clarifies the applicability of Fair Credit Reporting Act protection to volunteers.** "Staff report with summary of interpretations" issued in July 2011 indicates that "volunteers" should be treated as employees with respect to the applicability of the FCRA. The report notes that "Because the term 'employment purposes' is interpreted liberally to effectuate the broad remedial purpose of the FCRA, it may apply to situations where an entity uses individuals who are not technically employees to perform duties... [including] a nonprofit organization staffed in whole or in part by volunteers."

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## Misclassification Initiative

- DOL and IRS join forces
- Eleven states have signed agreements with the Wage and Hour Division of DOL
  - To enable sharing of information and coordination of enforcement activity

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## Target States

The DOL Misclassification Initiative

Make a selection: ▾

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Wage and Hour Division (WHD)  
Minimum Wage Laws in the States - January 1, 2012  
[Historical Table](#)

Click on any state or jurisdiction to find out about applicable minimum wage laws.  
Note: Where Federal and state law have different minimum wage rates, the higher standard applies.

Make a selection: ▾

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## Wage and Hour Division (WHD)

### State Labor Laws

[State Labor Offices](#)

[Federal vs. State Family Medical Leave Laws](#)

#### Fair Labor Standards

- [Current State Minimum Wage Rates](#)
- [Employment/Age Certificate Issuance Practice Under State Child Labor Laws and Programs](#)
- [Minimum Rest Period Requirements Under State Law for Adult Employees in Private Sector](#)
- [Minimum Length of Meal Period Required Under State Law for Adult Employees in Private Sector](#)

[www.dol.gov/whd/state/state.htm](http://www.dol.gov/whd/state/state.htm)

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## Ban the Box Legislation

- Restricts or limits employers from asking about applicant's criminal record during hiring process.
- Did you know...
  - 92 million Americans have a criminal history?
  - Only 4% of the 14 million arrests in 2009 were for serious, violent crimes?

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## "Ban the Box"

"More and more urban areas across the United States are limiting discrimination in city and county jobs against people with criminal records. In the past year alone, cities in Connecticut, Washington, Michigan, Tennessee and Ohio have all joined the movement to ban the box."  
Source: NELP

Cities and counties that have "banned the box":

<a href="#">Alameda County, CA</a>	<a href="#">Minneapolis, MN</a>
<a href="#">Austin, TX</a>	<a href="#">Multnomah County, OR</a>
<a href="#">Baltimore, MD</a>	<a href="#">New Haven, CT</a>
<a href="#">Berkeley, CA</a>	<a href="#">Norwich, CT</a>
<a href="#">Boston, MA</a>	<a href="#">Oakland, CA</a>
<a href="#">Bridgeport, CT</a>	<a href="#">Philadelphia, PA</a>
<a href="#">Cambridge, MA</a>	<a href="#">Providence, RI</a>
<a href="#">Chicago, IL</a>	<a href="#">San Francisco, CA</a>
<a href="#">Cincinnati, OH</a>	<a href="#">Seattle, WA</a>
<a href="#">Detroit, MI</a>	<a href="#">St. Paul, MN</a>
<a href="#">Hartford, CT</a>	<a href="#">Travis County, TX</a>
<a href="#">Jacksonville, FL</a>	<a href="#">Washington, DC</a>
<a href="#">Kalamazoo, MI</a>	<a href="#">Worcester, MA</a>
<a href="#">Memphis, TN</a>	

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## Pepsi Settlement

- EEOC determined that 300 black applicants were excluded from consideration due to Pepsi's "over broad" policy which denied employment to those arrested or convicted of even minor crimes.
- Pepsi has revised its policy, and will provide training and pay \$3.13 Million to applicants who were not hired, and offers of employment to those qualified.

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## "Ban the Box" and Pepsi Settlement Lessons

- ❑ Do not adopt a policy (or practice) that renders any applicant with a prior conviction ineligible for any position in your nonprofit.
- ❑ Remember that your policy concerning eligibility for employment must consider, at a minimum, three factors: (1) nature of the position sought, (2) nature and gravity of offense, and (3) the time since the conviction.

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## Questions?



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## Next Up... 2012 HR Series



**February 16—** Why Can't We All Get Along? Managing a Multi-Generational Workforce

[www.nonprofitrisk.org/training/webinars/webinars\\_HR\\_2012.asp](http://www.nonprofitrisk.org/training/webinars/webinars_HR_2012.asp)

[www.nonprofitrisk.org](http://www.nonprofitrisk.org)

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Thank you!

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